

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs September 19, 2001

**STATE OF TENNESSEE v. STEVE A. CLARK**

**Direct Appeal from the Circuit Court for Grundy County  
No. 3314 J. Curtis Smith, Judge**

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**No. M2000-03148-CCA-R3-CD - Filed October 30, 2001**

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The Appellant, Steve A. Clark, was convicted by a Grundy County jury for driving under the influence, Tenn. Code Ann. § 55-10-401(a)(1), driving with an alcohol concentration of .10% or more, Tenn. Code Ann. § 55-10-401(a)(2), and driving without a license.<sup>1</sup> On appeal, Clark raises one issue for our review: Whether the trial court erred by admitting into evidence the results of the intoximeter test? After review, we find no error and affirm Clark's conviction for driving under the influence.

**Tenn. R. App. P. 3; Conviction Affirmed; Remanded for Entry of Judgment of Conviction**

DAVID G. HAYES, J., delivered the opinion of the court, in which GARY R. WADE, P. J., and JERRY L. SMITH, J., joined.

Philip A. Condra, District Public Defender, Jasper, Tennessee, for the Appellant, Steve A. Clark.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; J. Ross Dyer, Assistant Attorney General; James Michael Taylor, District Attorney General; and Steve Strain, Assistant District Attorney General, for the Appellee, State of Tennessee.

**OPINION**

**Factual Background**

Shortly after midnight on February 16, 1999, Officer Brian Wiley of the Monteagle Police Department observed a car traveling towards him with one headlight out and pulled the vehicle over.

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<sup>1</sup> At sentencing, the trial judge advised that the two DUI convictions would be merged into one count of driving under the influence, reflecting a single judgment of conviction. However, no judgment of conviction for DUI is included in the record. Accordingly, we find it necessary to remand in order to insure that a judgment of conviction is included in the circuit court case file.

Officer Wiley approached the Appellant, who was the operator of the car, and asked to see his driver's license. After the license was produced, Officer Wiley noticed that the Appellant's driver's license had expired five days earlier. Officer Wiley detected a strong odor of alcohol from within the interior of the vehicle and observed an open beer container wedged between two seats. He further observed five cans of unopened beer in the vehicle. When Officer Wiley asked the Appellant if he had been drinking, the Appellant replied, "What's it f---ing matter. This is bullshit."

Officer Wiley asked the Appellant to exit his vehicle so that he could conduct field sobriety tests. The Appellant initially refused but after several requests and upon arrival of another officer at the scene, the Appellant complied. The Appellant then explained that he had "bad knees" and told Officer Wiley that he could not do the one-leg stand. Officer Wiley asked the Appellant to perform the heel/toe test, but the Appellant "couldn't comprehend" what the officer was asking and never tried to perform the test.

At this time, Officer Wiley placed the Appellant under arrest. Wiley and the Appellant arrived at the Grundy County Sheriff's Office at 12:49 a.m. The Appellant signed an implied consent form at 1:00 a.m. and Deputy Sheriff Jimmy Lewis administered the breathalyzer test at 1:15 a.m. The test results indicated that the Appellant's blood alcohol level was .25%.

At trial, the Appellant testified that he had frequented two bars and consumed four beers between 8:00 p.m. and 11:30 p.m. the night of his arrest. He admitted that five cans of unopened beer were found in his vehicle and stated "there might have been one open that's been setting in the car . . . I couldn't honestly say, I do not recall drinking one."

## ANALYSIS

The Appellant contends that the trial court erred by admitting the results of his intoximeter test into evidence. Specifically, he contends that the State failed to comply with the requirements of State v. Sensing, 843 S.W.2d 412 (Tenn. 1992) by "fail[ing] to lay the evidentiary foundation for admissibility of the breath test results, either in the hearing on the motion or during the testimony offered at trial."

In Sensing, our supreme court set forth the following six requirements that must be established before the results of a breathalyzer test can be admitted into evidence:

- (1) that the tests were performed in accordance with the standards and operating procedure promulgated by the forensic services division of the Tennessee Bureau of Investigation;
- (2) that he was properly certified in accordance with those standards;

- (3) that the evidentiary breath testing instrument used was certified by the forensic services division, was tested regularly for accuracy and was working properly when the breath test was performed;
- (4) that the motorist was observed for the requisite 20 minutes prior to the test, and during this period, he did not have foreign matter in his mouth, did not consume any alcoholic beverage, smoke, or regurgitate;
- (5) evidence that he followed the prescribed operational procedure;
- (6) identify the print-out record offered in evidence as the result of the test given to the person tested.

Sensing, 843 S.W.2d at 416. The State had the burden of proving that the breath test complied with the Sensing requirements. State v. McCaslin, 894 S.W.2d 310, 312 (Tenn. Crim. App. 1994). On appeal, we presume that the trial court's determination regarding the Sensing requirements is correct unless the evidence preponderates otherwise. State v. Edison, 9 S.W.3d 75, 78 (Tenn. 1999).

Prior to trial, the Appellant filed a motion in limine requesting that the trial court prohibit the State from admitting into evidence the results of the breathalyzer test because the requirements of Sensing were not met. After hearing oral arguments on the motion, the trial court denied the Appellant's request finding:

[Deputy Lewis] testifies that he was close, physically close within a matter of feet of the defendant all during this time . . . I think that's sufficient observation for a 20 minute period to come within the requirements of Sens[i]ng, so I do find, based upon the testimony of the two officers, particularly the first officer [Wiley], that he did observe the defendant for a period of 20 minutes and that he didn't take any foreign matter into his mouth or consume any alcoholic beverage, smoke, or regurgitate during that period of time.

At the conclusion of the State's proof, the Appellant renewed his objection to the admission of the breathalyzer test results and was again overruled by the trial court.

The Appellant first argues that the State failed to fulfill the Sensing requirements when it "asked no questions about (1) the operating procedure[,] (2) the certification and testing of the machine for accuracy[,] or (3) compliance with operational procedure." Deputy Jimmy Lewis, who performed the breath test on the Appellant, testified that he was trained by the Tennessee Bureau of Investigation with regard to the proper operating procedure to be followed when administering the test. Although Deputy Lewis could not recall when the machine was last calibrated prior to testing the Appellant, he testified that the calibration was done on a regular basis and recorded on a certificate located near the machine. Deputy Lewis also testified that he tested the machine to make

sure it was working properly prior to administering the Appellant's test. He also entered all relevant information about the Appellant into the machine prior to running the test. Additionally, Deputy Lewis testified that the intoximeter printout introduced by the State correctly reflected the results of the test he conducted on the Appellant. We conclude that this testimony supports, by a preponderance of the evidence, the first, second, third, fifth and sixth requirements under Sensing.

The Appellant next asserts that because neither officer had eye to eye contact with the Appellant for the entire twenty minute period, the State failed to prove compliance with the fourth requirement of Sensing. The purpose of the fourth requirement is to ensure "that no foreign matter is present in the defendant's mouth that could retain alcohol and potentially influence the results of the test." State v. Cook, 9 S.W.3d 98, 100-01 (Tenn. 1999). This court has discussed on many occasions the issue of whether eye to eye contact for the entire twenty minute period is necessary in order to meet the fourth requirement of Sensing. In State v. Luckett, No. M2000-00528-CCA-R3-CD (Tenn. Crim. App. at Nashville, Mar. 8, 2001), this court held that the purpose of the observation period is satisfied where the officer remains in very close proximity to the defendant for the entire time, engages him or her in conversation, and loses direct eye contact for only brief intervals of time. Similarly, in State v. Gregory L. Parker, No. M1999-00209-CCA-R3CD (Tenn. Crim. App. at Nashville, Dec. 30, 1999), *perm. to appeal denied*, (Tenn., Oct. 23, 2000), this court affirmed the trial court's admission of the defendant's breath test results based upon the officer being within close proximity of the defendant during the waiting period. *But see State v. Korsakov*, 34 S.W.3d 534 (Tenn. Crim. App. 2000)(evidence preponderates against the trial court's finding that the twenty minute requirement was satisfied where the officer was looking at paperwork during the waiting period); State v. Harold E. Fields, No. 01C01-9412-CC-00438 (Tenn. Crim. App. at Nashville, Apr. 12, 1996) (trial court erred in admitting results of breathalyser test where deputy filled out paperwork during twenty minute time period and failed to keep the defendant in view entire twenty minutes); State v. Deloit, 964 S.W.2d 909 (Tenn. Crim. App. 1997)(trial court erred in admitting the results of defendant's breathalyser test where officer filled out paperwork in the front seat of his vehicle while the defendant was in the back seat).

In the present case, Officer Wiley arrived at the sheriff's office at 12:49 a.m. Once inside, the Appellant also met with Deputy Lewis. Deputy Lewis testified that he observed the Appellant for a period of twenty minutes before the test was administered at 1:15 a.m. Deputy Lewis admitted that he did not have "eyeball to eyeball" contact with the Appellant the entire twenty minutes because he had to look down to enter the Appellant's data into the machine. Nonetheless, he testified that the Appellant was eight feet from him the entire time and that he did not observe the Appellant eat, drink, chew gum, smoke, regurgitate, vomit or belch prior to taking the test. Officer Wiley also remained with the Appellant until the test was administered. Officer Wiley testified that he sat and looked at the Appellant uninterrupted for twenty minutes and that he was within "arm's length" of the Appellant the entire time. The State must establish, by a preponderance of the evidence, that the Appellant's mouth was free of foreign matter for a period of twenty minutes prior to his taking the breathalyser test. We conclude that the State has met this burden.

## CONCLUSION

After review, we find that the State established the six requirements set forth in Sensing by a preponderance of the evidence. Accordingly, the Appellant's conviction for DUI is affirmed. As previously noted in footnote 1 of this opinion, this case is remanded to the trial court for entry of a judgment of conviction.

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DAVID G. HAYES, JUDGE